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In The

Supreme Court of the United States

RICARDO ANTONIO WELCH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Torts Claim Act, 28 U.S.C. §§ 1346(b), 2671-2780, the United States expressly waives its sovereign immunity for the "wrongful act or omission" of a government employee "acting within the scope of his office or employment" where the United States, "if a private person, would be liable" under the law of the state "where the act or omission occurred." (Pet. App. at 24a.) This general waiver of sovereign immunity is subject to a number of exceptions. In particular, 28 U.S.C. § 2680(h) bars certain intentional tort claims against the United States. In 1974, however, Congress amended § 2680(h) to provide an "exception to the exception": When law enforcement officers commit certain intentional torts, the United States waives its sovereign immunity (the "law enforcement proviso"). Section 2680(a) contains general exceptions to the United States' waiver of sovereign immunity, including the discretionary function and due care provisions.

The questions presented are:

1. Whether a claim that falls squarely within Congress's specific waiver of sovereign immunity pursuant to the law enforcement proviso also must overcome § 2680(a)'s general exceptions?

2. Whether § 2680(a)'s due care provision bars all tort actions against the United States when a government actor properly follows the dictates of a mandatory statute, regardless of the resulting harm?

PARTIES TO THE PROCEEDING

Petitioner is Ricardo Antonio Welch, Jr. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Ricardo Antonio Welch, Jr., respectfully petitions for a writ of *certiorari* to review the decision below of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-12a) is reported at 409 F.3d 646. The opinion of the United States District Court for the District of Maryland (Pet. App. 13a-21a) is reported at 316 F. Supp. 2d 252.

JURISDICTION

The opinion of the Court of Appeals was issued on May 31, 2005. An order denying a petition for rehearing and rehearing *en banc* was entered on July 26, 2005. (Pet. App. 22a-23a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 *et seq.*, are set out in an appendix to this petition. (Pet. App. 24a-25a.)

STATEMENT OF THE CASE

1. The facts underlying this case are not disputed. The Petitioner, Ricardo Welch, is a longtime, legal permanent resident of the United States. Mr. Welch moved to the United States from Panama in 1978 at the age of ten, and has lived in Maryland for most of his life. After graduating from Bethesda High School in 1986, Mr. Welch joined the United States Navy. While in the Navy, Mr. Welch served on the U.S.S. Independence during the Panama crisis in the late 1980s. In 1990, Mr. Welch ceased active duty, but continued to serve in the Naval Reserve until he was honorably discharged in May 1994. Mr. Welch currently resides in Silver Spring, Maryland, with his wife and three children. Mr. Welch's wife, parents, two of his three siblings and all three children are citizens of the United States. Mr. Welch has worked at the same Maryland company, Livingston Fire Protection, Inc., almost continuously for the past decade.

2. In August 1997, on the basis of Mr. Welch's guilty plea to certain state charges stemming from a 1993 altercation, an immigration judge ordered Mr. Welch deported. As a result, on October 14, 1998, Immigration and Naturalization Service ("INS") officials detained Mr. Welch pursuant to a final order of deportation. On April 22, 1999, the convictions underlying the deportation order were vacated, yet the INS continued to detain Mr. Welch pursuant to Section 236(c) of the Immigration and Naturalization Act ("INA § 236(c)") (codified at 8 U.S.C. § 1226(c)(1)(B)). INA § 236(c) mandates that the INS take into custody and indefinitely jail any alien who is deportable for certain violations while providing no opportunity for a bail hearing.

3. On September 14, 1999, Mr. Welch filed a petition for a writ of *habeas corpus*, demanding not his release, but only that the immigration court provide him the opportunity to prove he was bailable. On June 6, 2000, the United States District Court for the District of Maryland held that INA § 236(c)'s no-bail provision violated Mr. Welch's constitutional rights because it failed to provide for an individualized bail hearing. *See Welch v. Reno*, 101 F. Supp. 2d 347, 356 (D. Md. 2000), *aff'd*, *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002). Pursuant to the District Court's order, on June 16, 2000, an immigration judge provided Mr. Welch a bail hearing and granted bail, determining that Mr. Welch was neither a flight risk nor a danger to the community.[1] At the time Mr. Welch was released on bail, he had been jailed against his will and without lawful justification for 422 days.

4. On June 19, 2002, the United States Court of Appeals for the Fourth Circuit held that INA § 236(c) was unconstitutional as applied to Mr. Welch. *Welch v. Ashcroft*, 293 F.3d 213, 224 (4th Cir. 2002) ("*Welch I*"). The Fourth Circuit held that INA § 236(c)'s mandatory detention provision, which failed to afford Mr. Welch a bail hearing, violated Mr. Welch's Fifth Amendment substantive due process rights. The *Welch I* court further concluded that "[f]ourteen months of incarceration *pendente lite* of a longtime resident alien with extensive community ties, with no chance of release and no speedy adjudication rights as in criminal proceedings, together lead [the court]

[1] Despite opposing Mr. Welch's bail request, the United States did not call any witnesses at the bail hearing, nor did the United States appeal the immigration court's decision to grant bail.

to conclude that the circumstances of Welch's detention constitute punishment without trial." *Id.*[3]

5. While the *Welch I* decision was pending, the United States urged this Court to grant *certiorari* review of the decisions of three other Courts of Appeals regarding the constitutionality of INA § 236(c). Before this Court made its *certiorari* decision in those other cases, the Solicitor General informed this Court on June 20, 2002, of the newly-decided *Welch I* opinion. The Solicitor, however, affirmatively chose not to petition for *certiorari* review of the *Welch I* decision. In the United States' merits brief, moreover, the Solicitor General suggested that Mr. Welch's as-applied challenge to INA § 236(c) was appropriate. *See* Brief for the Petitioners at 48-49, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) (citing the Fourth Circuit's decision in *Welch I*). On April 29, 2003, this Court issued its decision in *Demore*, holding INA § 236(c) facially constitutional. *Demore v. Kim*, 538 U.S. 510, 531 (2003). However, because the Fourth Circuit decision is an as-applied decision, *Welch I* "remains the final authoritative ruling" with respect to Mr. Welch. (Pet. App. at 15a.)

6. On June 4, 2002, Mr. Welch filed a timely administrative claim against the United States, pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b),

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[3] In *Welch I*, the United States did not challenge the district court's ruling that the INS's attempt to apply the permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-3546 (1996) to his deportation proceedings violated Mr. Welch's equal protection rights. *See Welch v. Reno*, 2000 WL 1481426, at *3 (D. Md. September 20, 2000). Similarly, after an immigration court granted Mr. Welch's application for cancellation of his removal proceedings in July 2002, the United States did not appeal.

2671-2680, seeking monetary damages for his 422 days of false imprisonment. After the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security, the successor agency to the INS, denied Mr. Welch's administrative claim on April 23, 2003, Mr. Welch filed a complaint in the United States District Court for the District of Maryland on October 15, 2003.

7. Mr. Welch alleged that the United States was liable under the FTCA's law enforcement proviso because his 422 days of unlawful detention constituted false imprisonment. The FTCA provides that the law of the place where the act or omission occurred governs a substantive claim. (Pet. App. at 24a); *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (state law is "the source of substantive liability under the FTCA"). Under Maryland law,[3] Mr. Welch's detention constituted false imprisonment, as it amounted to a non-consensual deprivation of his liberty without legal justification. *See Ashton v. Brown*, 660 A.2d 447, 471, 473 (Md. 1995) (holding that whether a detention is legally justified is based on the "objective lawfulness" of the detention at the time of the detention and finding liability even though the arrest and detention arose out of the application of an ordinance later deemed unconstitutional).

8. Without oral argument, the district court granted the United States' Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The district court held that § 2680(a)'s due care provision barred Mr. Welch's intentional tort claim, without determining whether

[3] Maryland law governs because Mr. Welch was jailed against his will at the Wicomico County Detention Center in Salisbury, Maryland.

Mr. Welch's claim even fell within the purview of § 2680(h)'s law enforcement proviso. (Pet. App. at 20a.)

9. The Fourth Circuit affirmed the district court decision. (Pet. App. at 12a.) On appeal, Mr. Welch argued that the unconstitutional nature of his detention rendered the due care provision inapplicable, regardless of whether § 2680(a) presented a hurdle in the first instance to his § 2680(h) intentional tort claim. The Fourth Circuit disagreed.

First, the Fourth Circuit decision held that "intentional tort claims authorized by § 2680(h) must overcome the § 2680(a) due care hurdle before sovereign immunity can be deemed waived." *Id.* at 8a. The Fourth Circuit equated § 2680(a)'s due care and discretionary function provisions and treated them identically in terms of their interplay with § 2680(h), stating that there was "no compelling reason . . . for treating the parallel 'due care' exception differently." *See id.*

Second, the Fourth Circuit held that the United States retained its sovereign immunity under § 2680(a)'s due care provision. The court rejected the argument that government officials could not have acted with "due care" while concurrently violating Mr. Welch's constitutional rights. Essentially, the Fourth Circuit interpreted the due care exception synonymously with reasonable care and held that the due care exception barred Mr. Welch's claim because the INS non-negligently executed the mandates of INA § 236(c). *See id.* at 10a. ("Absent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care.").

10. The Fourth Circuit denied Mr. Welch's petition for rehearing and rehearing *en banc* on July 26, 2005. (Pet. App. 22a-23a.)

REASONS FOR GRANTING THE PETITION

The Fourth Circuit decision adds to the conflict and disagreement among the Courts of Appeals with respect to how federal courts should interpret and reconcile the law enforcement proviso and the general exceptions to the United States' waiver of sovereign immunity under § 2680(a) of the FTCA. Moreover, the decision below misinterprets the due care provision as precluding all liability against the United States when a government actor properly follows the dictates of a mandatory statute, regardless of the resulting harm. Review by this Court is warranted to resolve the lack of consensus among the Courts of Appeals on important and recurring issues related to the interpretation of these two FTCA provisions.

I. THE FOURTH CIRCUIT DECISION EXACERBATES THE CONFLICT AND DISAGREEMENT AMONG THE COURTS OF APPEALS REGARDING WHETHER A CLAIM THAT FALLS SQUARELY WITHIN CONGRESS'S SPECIFIC WAIVER OF SOVEREIGN IMMUNITY PURSUANT TO THE LAW ENFORCEMENT PROVISO ALSO MUST OVERCOME SECTION 2680(A)'S GENERAL EXCEPTIONS

The FTCA expressly waives the United States' sovereign immunity for the "wrongful act or omission" of a government employee "acting within the scope of his office or employment" where the United States, "if a private

person, would be liable" under the law of the state "where the act or omission occurred." (Pet. App. at 24a.) This general waiver of sovereign immunity is subject to a number of exceptions.

At its inception, pursuant to § 2680(h), the FTCA barred claims against the United States for certain intentional torts. In 1974, however, Congress amended § 2680(h) to provide an exception to the intentional tort bar. Since then, the United States' sovereign immunity is considered waived for certain intentional torts, including false imprisonment, if the claim is based on the "acts or omission of investigative or law enforcement officers of the United States Government" ("the law enforcement proviso"). *Id.*

Section 2680(a) contains the general exception to the United States' waiver of sovereign immunity. The section states, in relevant part, that the United States retains its sovereign immunity if a claim is "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid" ("the due care provision") or if the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused" ("the discretionary function exception"). (Pet. App. at 25a.)

In the over thirty years since Congress amended FTCA § 2680(h) to waive the United States' sovereign immunity for certain intentional torts committed by law enforcement, several courts have attempted to analyze its interplay with § 2680(a)'s discretionary function exception. While the decision below is the first case to analyze the

law enforcement proviso's interplay with § 2680(a)'s due care provision, the Fourth Circuit treated § 2680(a)'s due care and discretionary function provisions identically in terms of their interplay with § 2680(h), stating that there was "no compelling reason . . . for treating the parallel 'due care' exception differently." (Pet. App. at 8a.) Whether a claim pursuant to the law enforcement proviso in § 2680(h) first must clear the general exceptions in § 2680(a) has proved a divisive question for the Courts of Appeals. Review by this Court is warranted to resolve the decades-long confusion with respect to the interplay between § 2680(h)'s law enforcement proviso and § 2680(a)'s general exceptions to the United States' waiver of sovereign immunity.

A. The Courts of Appeals Agree That Whether and How to Reconcile the Law Enforcement Proviso with the General Exceptions in § 2680(a) Is Unclear.

The Courts of Appeals that have attempted to reconcile the two provisions have devised different, and often contradictory, analyses. As the Fourth Circuit itself noted as recently as 2001, the interplay between these two FTCA provisions "remains unsettled," and "[f]ederal courts have struggled somewhat in deciding . . . whether and how to apply [the discretionary function exception]" in cases brought pursuant to the law enforcement proviso. *Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001). The United States Court of Appeals for the D.C. Circuit has observed that "[b]ecause the obscurity [of FTCA jurisprudence] is matched only by its wealth of conclusory analytical labels, wading through the relevant case law is surprisingly difficult." *Gray v. Bell*, 712 F.2d 490, 507 (D.C.

Cir. 1983). Similarly, the United States Court of Appeals for the Fifth Circuit noted that although the FTCA was "designed 'to afford easy and simple access to the federal courts for persons injured by the activities of government,'" that simplicity has been "rendered more intricate by the numerous exceptions and provisos to the waiver that are found in § 2680." *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987) (citations omitted). The time has come for this Court to end the confusion and determine the proper interpretation of the law enforcement proviso and the general exceptions to the United States' sovereign immunity in § 2680(a). The decisions of the five Courts of Appeals that have directly addressed this issue are set forth below.

1. The Fourth Circuit Test

The decision below held that all claims brought pursuant to the law enforcement proviso in § 2680(h) must first overcome the due care exception to the waiver of sovereign immunity contained in § 2680(a). (Pet. App. at 8a.) The Fourth Circuit had previously required all such claims overcome the discretionary function exception. Specifically, the Fourth Circuit held that when faced with a claim brought pursuant to the law enforcement proviso, the United States retains its sovereign immunity through § 2680(a)'s discretionary function exception if the "actions underlying [the] intentional tort allegations" were "authorized and implemented consistent with federal law and the Constitution of the United States." *Medina*, 259 F.3d at 226 (citing *Jackson v. United States*, 77 F. Supp. 2d 709, 714 (D. Md. 1999)). The Fourth Circuit decision below reasoned that there was "no compelling reason . . . for treating the parallel 'due care' exception differently" than

the discretionary function exception, and held that claims brought pursuant to the law enforcement proviso cannot lie until after an analysis of the due care exception. (Pet. App. at 8a.) As a result, the Fourth Circuit now mandates that before liability can be established for the specifically enumerated intentional torts set forth in the law enforcement proviso, a plaintiff first must overcome the general exceptions to the United States' waiver of sovereign immunity contained in § 2680(a). Such a rule conflicts with the decisions of other Courts of Appeals.

2. The Fifth Circuit Test

The Fifth Circuit, for example, has concluded that a FTCA plaintiff who alleges an intentional tort suit under § 2680(h) need not surmount § 2680(a)'s discretionary function exception to proceed with their claims. *See Sutton*, 819 F.2d at 1289, 1297. In *Sutton*, the plaintiffs alleged malicious prosecution, false arrest and abuse of process stemming from a mail fraud investigation. The district court dismissed the intentional tort claims because the plaintiff "had failed to surmount the hurdle of the discretionary function exception." *Id.* at 1290. The Fifth Circuit reversed and remanded.

In declining to find that a FTCA plaintiff categorically needs to clear § 2680(a) prior to establishing a § 2680(h) claim, the court looked to the legislative history of the amended § 2680(h) and the plain language of the law enforcement proviso. The Fifth Circuit reasoned, "that if the law enforcement proviso is to be more than an illusory-now you see it, now you don't-remedy, the discretionary function exception cannot be an absolute bar which one must clear to proceed under § 2680(h)." *Id.* at 1297. The

court recognized that "Congress intended [the law enforcement proviso] to have meaningful effect," and thus construed § 2680(h) "to give it such effect." *See id.* at 1295 (citations omitted). In the court's view, if § 2680(h) actions "must also clear the hurdle of the discretionary function exception," even the instances of illegal searches and seizures that Congress hoped to remedy through the adoption of the amendment "would not pass muster." *Id.* at 1296. Such a reconciliation of the two provisions would "fail to create the effective legal remedy intended by Congress." *Id.*

The Fifth Circuit emphasized that the plain language of the law enforcement proviso contained in § 2680(h) waives sovereign immunity for "any claim" arising out of the specifically enumerated intentional torts. Although § 2680(a) also provides that the United States retains its sovereign immunity for "any claim" that falls within its general exceptions, the Fifth Circuit reasoned that it was "safely presume[d] [that] Congress knew that existing law provided" that the actions underlying the specified intentional torts "were considered discretionary at the time Congress amended § 2680(h)." *Id.* at 1294-95. To the Fifth Circuit, that Congress amended § 2680(h) to "expressly provide for suits against the government" for intentional torts committed by law enforcement was "categorical and unqualified." *Id.* at 1294, 1296 ("The language of the Senate report [states that] [t]he government is to be liable *whenever* its agents commit constitutional torts and *in any case* in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the proviso.").

3. The Second Circuit Test

In a similar vein, the United States Court of Appeals for the Second Circuit has intimated that § 2680(a) should not bar a valid § 2680(h) claim. In *Caban v. United States*, a plaintiff sued the United States for various torts, including false imprisonment, stemming from a six-day detention by the INS. *See* 671 F.2d 1230 (2d Cir. 1982). The Second Circuit found § 2680(a) inapplicable, holding that although the INS agents exercised discretion, their actions did not constitute the type of policy decisions contemplated by the INS statute or regulations. *Id.* at 1233. The Second Circuit warned against any reading of the two provisions that would result in one "eviscerat[ing] the other," and refused to interpret the INS's actions as discretionary within the meaning of § 2680(a), as that would "jeopardize a primary purpose for enacting § 2680(h)." *Id.* at 1234. Section 2680(h), the court stressed, "was designed to 'provide a remedy against the Federal Government for innocent victims of Federal law enforcement abuses.'" *Id.* at 1234-35 (citing S. Rep. No. 93-588 (1974)). Finding that because § 2680(h) "clearly allows the government to be sued for narcotics' agents abuses," the detention, if found to constitute an intentional tort, "seem[ed] an a fortiori case for allowing suit" under that proviso. *Id.* at 1235.

4. The D.C. Circuit Test

The United States Court of Appeals for the D.C. Circuit, in its consideration of the interplay between §§ 2680(a) and 2680(h), held that a § 2680(h) claim must clear the discretionary function exception hurdle, as the two FTCA provisions "are neither inconsistent nor mutually exclusive." *See Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983). However, the court rejected the notion that

§ 2680(a)'s discretionary function exception would always constitute a bar to an intentional tort claim. To the court, it was "clear" that the intentional torts specified in the law enforcement proviso "may be committed without any exercise of a discretionary function." *Id.* at 507. Although the court did not provide specific examples, it did note that because the law enforcement proviso applies to persons "whose jobs do not typically include discretionary functions, it will be rare" that § 2680(a) would bar a suit "permissible under the proviso to section 2680(h)." *Id.* at 508; *accord Beran v. United States*, 759 F. Supp. 886, 892 (D.D.C. 1991) (refusing to dismiss plaintiff's § 2680(h) claims based on the discretionary function exception, as police work is not discretionary; to find otherwise would require the court to "functionally . . . read § 2680(h) out of the FTCA"). The D.C. Circuit, however, did not rule out that § 2680(h) claims could "come within the purview of the discretionary function exception to section 2680(a)." *Id.* at 507.

5. The Third Circuit Test

The United States Court of Appeals for the Third Circuit took the holding in *Gray* a step further and adopted a more limited set of circumstances under which § 2680(a) would not present a bar to a § 2680(h) intentional tort claim. *See Pooler v. United States*, 787 F.2d 868 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986). In considering claims for false arrest and malicious prosecution brought pursuant to § 2680(h), the Third Circuit held that the law enforcement proviso was limited to those torts committed "in the course of a search, a seizure, or an arrest." *Id.* at 872.

The Third Circuit noted that so limiting the applicability of § 2680(h) "largely eliminates" any potential overlap between § 2680(a)'s discretionary function exception and § 2680(h)'s law enforcement proviso. *See id.* The court observed that it would be "hard to imagine" any instance where the "activities of officers engaging in searches, seizures or arrests would be anything other than operational." *Id.*; *but cf. United States v. Gaubert*, 499 U.S. 315, 326 (1991) (rejecting distinction between "discretionary functions and operational activities"). Thus, while the court did not specifically answer whether § 2680(a)'s discretionary function exception presents a hurdle to § 2680(h) claims generally, it did hold that absent "discretionary action" on the part of the law enforcement officials, § 2680(a) cannot present a bar to § 2680(h) claims if the underlying tort arose in conjunction with traditional law enforcement activities.

As demonstrated by the above review of the decisions of the Courts of Appeals, lack of consistency and conflict exists in determining the proper interplay between the law enforcement proviso and § 2680(a)'s general exceptions to the United States' waiver of sovereign immunity. The Fourth Circuit and the D.C. Circuit attempt to wholly reconcile the provisions, while the Fifth Circuit and the Second Circuit acknowledge that the two FTCA provisions cannot be completely reconciled and the Third Circuit applies a judicial gloss to resolve the inconsistency between the provisions. This Court should provide clear guidance to the lower courts on this issue.

B. The Fourth Circuit's Interpretation of Sections 2680(a) and 2680(h) Potentially Renders the Law Enforcement Proviso Meaningless and Is Contrary to Legislative Intent.

Mr. Welch, the Petitioner, can satisfy the elements of a false imprisonment claim against the United States. The FTCA provides that the law of the place where the act or omission occurred governs the substantive claim. (Pet. App. at 24a); *FDIC v. Meyer*, 510 U.S. 471, 478 (1994) (state law is "the source of substantive liability under the FTCA"). Under Maryland law, the elements of a claim for false imprisonment are well-established: (1) the deprivation of the liberty of another; (2) without consent; and (3) without legal justification. *Ashton v. Brown*, 660 A.2d 447, 471 (Md. 1995) (citing *Great Atl. & Pac. Tea Co. v. Paul*, 261 A.2d 731, 738 (1970)). Mr. Welch's 422-day detention unquestionably was a "deprivation" of his liberty "without his consent." It was without "legal justification" because INA § 236(c) was found unconstitutional as applied to Mr. Welch.[4] Thus, despite the fact that Mr. Welch's claim falls squarely within Congress's specific waiver of sovereign immunity, the Fourth Circuit held that the United States retained its sovereign immunity.

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[4] In *Ashton*, the Maryland Court of Appeals held that a false imprisonment claim was established even though the underlying detention was made pursuant to a juvenile curfew statute believed constitutional at the time of the initial detention. In other words, the court found liability even though the police officers could not have known subjectively that the statute was unconstitutional. *Ashton*, 660 A.2d at 473 n.25. The court so held because a plaintiff "seeking to establish false imprisonment need not prove that the defendant intended to act wrongfully; 'the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification and the good or evil intention of the defendant does not excuse or create the tort.'" *Id.* (internal citations omitted).

The Fourth Circuit so finds by manipulating statutory construction principles to allow the United States to retain its immunity through the general exceptions in § 2680(a). While the Fourth Circuit decision interprets Congress's silence as to § 2680(h)'s interplay with § 2680(a) as "intend[ing]" that the latter's general exceptions were "to remain in effect," the better interpretation is that Congress knew of existing law at the time it adopted § 2680(h) and included the phrase "any claim" within the proviso to supersede § 2680(a). (Pet. App. at 8a.)

In this regard, the decision below is in conflict with the Fifth Circuit's decision in *Sutton*, and *Sutton* provides the better interpretation. *See Sutton v. United States*, 819 F.2d 1289, 1294-95 (5th Cir. 1987) (noting that it could "safely presume" that Congress was aware of § 2680(a) when it amended § 2680(h)). That § 2680(a) also contains the phrase "any claim" is understandable. Given that § 2680(a) was drafted and adopted almost thirty years before the law enforcement proviso was enacted, its reference to "any claim" is not dispositive of Congress's intent with regard to § 2680(h). Indeed, to hold otherwise would have required Congress to extrapolate on what "any claim" means as used in § 2680(h) and provide the exact circumstances in which § 2680(h) applies, as well as specifically outline its precise relation to all other pre-existing FTCA provisions. Such a rule would create too high a barrier for demonstrating legislative intent, and would not only sacrifice administrability, but also contravene Congress's role as legislator.[5]

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[5] Moreover, the Fourth Circuit decision reconciling the two FTCA provisions disregards two elementary canons of statutory construction, "specific over general" and "avoidance of rendering a provision illusory."

(Continued on following page)

Simply put, the Fourth Circuit decision below reconciles the law enforcement proviso and § 2680(a) in a manner that renders certain victims, like Mr. Welch, remediless for an intentional tort claim. Although adopted in response to illegal no-knock raids, the Senate report to the amendment specifically stated its adoption was not limited to illegal searches and seizures, but rather would apply to "any case" in which law enforcement officials commit intentional torts "while acting with the scope of his employment or under color of Federal law." S. Rep. No. 93-588, at 2791 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789. By mandating that conduct giving rise to § 2680(h) intentional tort claims must first overcome § 2680(a)'s general exceptions, the Fourth Circuit reconciled the provisions in a manner where one section "eviscerate[s] the other." *See Caban v. United States*, 671 F.2d 1230, 1234 (2d Cir. 1982); *see also Sutton*, 819 F.2d at 1295 (such a reconciliation "of the statute would result in judicial repeal of the law enforcement proviso by rendering its authorization

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It is fundamental that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). Whereas § 2680(h) provides for the express waiver of sovereign immunity for six specific tort claims, § 2680(a) only provides a general exception to § 1346(b)'s waiver of the United States' sovereign immunity. Given the disparate levels of specificity, § 2680(h)'s specificity trumps, despite its silence regarding its interplay with § 2680(a), the more general provision. Statutes also must be construed in a way so as to avoid rendering one part of it inoperable. *See, e.g., Freytag v. C.I.R.*, 501 U.S. 868, 877 (1991) (noting that the Supreme Court has "consistently expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'") (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)); *see also Sutton*, 819 F.2d at 1294-95 (It is "clear" that courts should "act under the assumption that Congress intended [§ 2680(h)'s] enactment to have meaningful effect.").

[for intentional tort claims] superfluous"). This Court should grant review of the Fourth Circuit decision to resolve the conflict.

II. THIS PETITION PRESENTS A QUESTION OF CONSIDERABLE IMPORTANCE REGARDING WHETHER SECTION 2680(A)'S DUE CARE PROVISION BARS ALL TORT ACTIONS AGAINST THE UNITED STATES WHEN A GOVERNMENT ACTOR FOLLOWS THE DICTATES OF A MANDATORY STATUTE, REGARDLESS OF THE RESULTING HARM

In the sixty years since its enactment, only a handful of courts have interpreted § 2680(a)'s due care provision, and those few courts that have done so have struggled with when and how to apply it. Relying on *dicta* from *Crumpton v. Stone*, 59 F.3d 1400, 1403 (D.C. Cir. 1995), the decision below sets forth a definitive test for when the due care provision is applicable: "[I]f a specific action is mandated [by a statute or regulation], we inquire as to whether the officer exercised due care in following the dictates of that statute or regulation. If due care was exercised, sovereign immunity has not been waived." (Pet. App. at 9a.) This "test" is question-begging – it says nothing more than the due care provision applies when due care is exercised, and it provides no guidance regarding how to determine whether "due care," in fact, was exercised in any particular case. The scarcity and variation of prior interpretations of § 2680(a)'s due care provision is further confused by the Fourth Circuit's adoption of this circular and unworkable "rule" from *Crumpton*.

A. The Due Care Provision Must Be Interpreted by Focusing Upon Whether "Due Care" Was Exercised, Not Whether the Statute at Issue Was "Valid."

The Fourth Circuit stated, without citation to any authority, that "[t]he obvious purpose of the [due care] provision is to immunize the conduct of an officer from tort liability regardless of whether the statute under which he is proceeding is ultimately upheld." (Pet. App. at 10a.) To support its conclusion, the Fourth Circuit incredibly asserts that Mr. Welch "does not claim that the INS officers carried out their responsibilities in an inappropriate manner. . . ." *Id.* at 9a. However, Mr. Welch alleged that the INS officers violated his Fifth Amendment substantive due process rights and committed the tort of false imprisonment under Maryland law.

In that regard, the Fourth Circuit reasoned that "Welch identifies no violation of his constitutional rights resulting from the execution of [INA § 236(c)] in a manner in which it was not intended." (Pet. App. at 11a.) But this rationale presupposes that Congress enacted INA § 236(c) *intending* to violate Mr. Welch's Fifth Amendment substantive due process rights. Such a conclusion also assumes that a federal officer executing a federal statute is *ipso facto* acting consistent with a legitimate federal policy. The wrongful acts underlying Mr. Welch's false imprisonment claim, however, are outside the bounds of acceptable constitutional conduct. A constitutional violation can never be said to further a legitimate federal policy, and that the INS officials acted pursuant to INA § 236(c)'s dictates is irrelevant to the determination as to whether due care was exercised. The Fourth Circuit simply ignored the *ultra vires* act that formed the basis of Mr. Welch's § 2680(h)

claim (the violation of his Fifth Amendment rights), and thus mistakenly held that § 2680(a) barred his claim.

The Fourth Circuit further attempts to justify its holding by relying upon a "plain language" argument. A "plain language" rule cannot, however, resolve the interplay between §§ 2680(a) and 2680(h). For example, in the face of unconstitutional conduct, courts have repeatedly reconciled the tension between the law enforcement proviso and § 2680(a)'s discretionary function exception by finding the discretionary function exception inapplicable to unconstitutional conduct.[6] These cases so find even though the "plain language" of § 2680(a) states that the discretionary function exception applies regardless of "whether or not the discretion involved be abused." (Pet. App. at 25a.) In other words, even when law enforcement officials abuse their discretion by violating constitutional rights, § 2680(a) does not shield the United States from liability. Thus, courts properly have refused to interpret § 2680(a) in a manner that is entirely divorced from Congress's intent in enacting the law enforcement proviso.[7] Sovereign immunity is deemed waived if constitutional rights are violated in a manner that also constitutes an intentional tort under the law enforcement proviso. Likewise, when an

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[6] *See Garcia v. United States*, 896 F. Supp. 467, 475 (E.D. Pa. 1995) (holding that the "discretionary function exception does not shield unconstitutional conduct" in a case involving a FTCA claim for unlawful detention); *see also Jackson v. United States*, 77 F. Supp. 2d 709, 714 (D. Md. 1999) ("The discretionary function exception does not immunize from suit any conduct that violates the Constitution . . . .").

[7] *See Leach v. FDIC*, 860 F.2d 1266, 1270 (5th Cir. 1988) ("[E]ven apparently plain words, divorced from the context in which they arise and in which their creators intended them to function, may not accurately convey the meaning the creators intended to impart.").

intentional tort under § 2680(h) is established in part by a constitutional violation, it cannot be said that "due care" was exercised, regardless of "whether or not such statute or regulation be valid." The Fourth Circuit's reliance on the plain language rule is, therefore, misplaced. Moreover, it conflicts with the rationale virtually every other court has applied to reconcile claims brought pursuant to the law enforcement proviso that also include some form of unconstitutional conduct.

B. The Due Care Provision Is Not Synonymous with Reasonable Care.

Confusion further exists regarding whether § 2680(a)'s due care exception is synonymous with barring any recovery for the non-negligent execution of a mandatory statute, regardless of the circumstances or resulting consequences. In applying the due care provision, the Fourth Circuit reasoned that because Mr. Welch made no allegation that the INS officers *negligently* applied the dictates of INA § 236(c), § 2680(a)'s due care provision bars Mr. Welch's FTCA intentional tort claim. (Pet. App. at 10a, 11a.) Mr. Welch never argued INA § 236(c) was negligently applied to him because he was not required to do so.[8] In fact, this Court has held that liability may lie under the FTCA for either "negligence or other form of 'misfeasance or nonfeasance.'" *Laird v. Nelms*, 406 U.S. 797, 799 (1972) (citing *Dalehite v.*

[8] Mr. Welch has never challenged the United States' authority to arrest and detain him in the first instance, but rather he challenged the failure to provide him a bail hearing and the opportunity to prove that he was bailable. By failing to provide Mr. Welch with a bail hearing, which might have, and eventually did, lead to his release, the INS violated Mr. Welch's Fifth Amendment substantive due process rights. *See Welch I*, 293 F.3d 213, 224 (4th Cir. 2002).

United States, 346 U.S. 15, 45 (1953) (rejecting FTCA claims based on an "absolute liability theory" and holding that the FTCA does not grant jurisdiction for strict liability torts)); (Pet. App. at 24a) (the United States is liable for "the negligent *or wrongful act or omission*" of any government employee") (emphasis added). In other words, a showing of negligence is not required to establish a claim under the FTCA – a "wrongful act or omission" will establish the waiver of the United States' sovereign immunity. Indeed, a wrongful act or omission, as here, can cause as much, or more, damage than a negligent act.

Contrary to the decision below, § 2680(a)'s due care provision is not synonymous with reasonable care. First, if the Fourth Circuit were correct, "the exception is meaningless." *See Stewart v. United States*, 486 F. Supp. 178 (C.D. Ill. 1980). In *Stewart*, the district court found the due care provision inapplicable in a case involving the sale of asbestos made pursuant to a statute specifically authorizing its sale. Rejecting the United States' argument that the due care exception barred the claim, the court reasoned that "since liability is predicated only on negligence or wrongful acts . . . [a]n exception for acts done with due care would be unnecessary and redundant." *Id.* at 181.

Second, as originally conceived, due care means more than simply the absence of negligence; it also means the absence of a violation of law. Indeed, until 1999, Black's Law Dictionary reflected this concept in its definition of "due care":

> This term, as usually understood in cases where the gist of the action is the defendant's negligence, implies not only that a party has not been negligent or careless, *but that he has been guilty of no violation of law in relation to the subject*

matter or transaction which constitutes the cause of action.

Black's Law Dictionary 499 (6th ed. 1990) (emphasis added); Black's Law Dictionary 448 (5th ed. 1979); Black's Law Dictionary 589 (4th ed. 1961); *see also* Black's Law Dictionary 626 (3d ed. 1933) (adding that "[e]vidence that a party is guilty of a violation of law supports the issue of want of proper care"); Black's Law Dictionary 401 (2d ed. 1910); Black's Law Dictionary 399 (1st ed. 1891); *accord Bosworth v. Swansey*, 51 Mass. 363, 365 (Mass. 1845) (equating due care with "free from fault" and held that a party must be "free from all just imputation of negligence *or fault*" to recover) (citations omitted) (emphasis added).

The violation of law principle stemmed from the doctrine of contributory negligence. This doctrine, which closely parallels the "clean-hands doctrine," prevented law-breaking parties from prevailing in tort actions. *Jones v. Andover*, 92 Mass. 18 (Mass. 1865), cited by Black's early due care definitions, illustrates the concept. In *Jones*, the underlying illegal conduct of the plaintiff – driving on a Sunday in violation of a Massachusetts blue law – negated his claim that he used due care while operating his vehicle, and thus prevented his recovery from the state for its negligent upkeep of the roads. *See id.* at 18. That Jones's Sunday travel did not represent a "direct unlawful act of omission or commission" was irrelevant; Jones was in the same position as if he had broken the speed limit or driven recklessly. *See id.* at 21 (violating the law "constitutes the fault or want of due care"). Although due care has been subsumed under the general umbrella of "care" in recent editions of Black's, due care as used in the FTCA cannot be properly interpreted without reference, and due weight given, to its historical meaning.

The decision below, however, held that due care was exercised even though the INS officials that jailed Mr. Welch acted in contravention of not just any law, but the U.S. Constitution. The Constitution, of course, is the fundamental legal instrument that embodies the laws of the United States, and the Fourth Circuit's interpretation of the due care exception is simply wrong: a substantive unconstitutional act, even if arising out of the execution of a mandatory statute, cannot be said to have been executed with "due care."

Therefore, the purpose of the due care provision, as best determined by legal precedent, is to ensure that when government officials act pursuant to a mandatory statute, the United States will not be liable without some showing of *fault*. Mr. Welch can demonstrate the fault necessary, *i.e.*, the intent element, to establish his false imprisonment claim. Moreover, under the applicable law, such requisite intent is an objective, not a subjective, standard. A plaintiff "seeking to establish false imprisonment need not prove that the defendant intended to act wrongfully." *Ashton v. Brown*, 660 A.2d 447, 473 n.25 (Md. 1995) ("'[T]he essence of the tort consists in depriving the plaintiff of his liberty without lawful justification, and the good or evil intention of the defendant does not excuse or create the tort.'") (citation omitted)).

Indeed, Congress specifically amended § 2680(h) to remove the bar of sovereign immunity in situations where a "Federal agent violates someone's constitutional rights." *See* S. Rep. No. 93-588, at 2790 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789. Congress intended to remedy the "manifest" injustice of providing absolute immunity for intentional torts committed by the United States while allowing recovery for run-of-the-mill negligence claims. Given this

clear intent, it is ironic that the Fourth Circuit maintains that Mr. Welch's intentional tort claim is barred because he fails to allege any negligence. (Pet. App. at 9a-10a.) Moreover, proof of negligence is not necessary to establish a false imprisonment claim under the law enforcement proviso. The Fourth Circuit decision impermissibly adds an extra element – some showing of negligence – to Mr. Welch's intentional tort claim. *See, e.g., College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 600 (4th Cir. 2005) (reversing, in part, because the district court "engrafted an erroneous additional element" of bad faith onto state law claims).

C. Mr. Welch's Claim Is Not an Attempt to Test the Validity of the Underlying Statute Nor Is Mr. Welch's Claim One for a Constitutional Tort.

The decision below mistakenly suggests that Mr. Welch is using his FTCA claim to challenge the validity of INA § 236(c). This Court and other federal courts have determined that the purpose of the first clause of § 2680(a) is to "bar test by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33 (1953); *see also Stewart v. United States*, 486 F. Supp. 178, 181 (C.D. Ill. 1980) ("[T]he primary purpose of [the due care provision is] to preclude testing the legality of a statute or regulation by tort action."). Mr. Welch's *habeas corpus* action is where he challenged the validity of INA § 236(c). Here, Mr. Welch's FTCA claim is for false imprisonment pursuant to 28 U.S.C. §§ 1346(b) and 2680(h), and he has satisfied all elements of that intentional tort claim under state law, "the source of

substantive liability under the FTCA." *See FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

Nor is Mr. Welch's claim one for a constitutional tort. Certainly, "no authority" exists that "would support a holding that claims which are otherwise actionable under state law are prohibited under the FTCA simply because the challenged conduct also violates the Constitution. In fact, case law is to the contrary." *See Garcia v. United States*, 896 F. Supp. 467, 475 (E.D. Pa. 1995) (citing *Rhoden v. United States*, 55 F.3d 428, 432 n.5 (9th Cir. 1995) (per curium)); *Carlson v. Green*, 466 U.S. 12, 19-20, 23 (1980) (noting that same conduct might give rise to both Bivens and FTCA actions) (other citations omitted)). To allow the Fourth Circuit decision to stand on this point would create a tension with Ninth Circuit precedent.[9]

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[9] The Ninth Circuit found that a FTCA claim of false imprisonment under § 2680(h) may be based on conduct which both violates the Constitution and amounts to false imprisonment under state law. In *Rhoden*, the plaintiff, a legal resident alien, was detained by the INS for six days without a hearing. *See Rhoden v. United States*, 55 F.3d 428, 430 (9th Cir. 1995). The court remanded to the lower court to resolve factual issues bearing on whether the detention was constitutionally reasonable (a fact already decided in Mr. Welch's case). The court stated that if the INS's detention of the plaintiff without a hearing was found to be unconstitutional, then the detention was not "legally justified or privileged" under California law and the plaintiff had established the tort of false imprisonment for purposes of his FTCA claim. *Id.* at 432 n.5. Importantly, the concept of legal justification is an element of false imprisonment under both California and Maryland law. *Compare id.* at 430 *with Ashton v. Brown*, 660 A.2d 447, 471 (Md. 1995). While the *Rhoden* court did not discuss § 2680(a)'s application, the Ninth Circuit had an obligation to raise *sua sponte* jurisdictional issues. Thus, the lack of any discussion leads to the conclusion that § 2680(a)'s exceptions did not act as a bar to the plaintiff's § 2680(h) false imprisonment claim.

CONCLUSION

No consensus exists as to how to reconcile § 2680(h)'s law enforcement proviso with the general exceptions in § 2680(a). Nor does a workable rule exist for when and how to apply § 2680(a)'s due care provision generally. If this Court does not review the Fourth Circuit decision, conflict and confusion regarding the interplay between the two provisions will remain and fester. Moreover, the decision below left the Petitioner without any civil remedy for his 422-day unlawful detention. This result is contrary both to the purpose of the FTCA and the most basic notions of justice.

For the reasons set forth herein, the Petitioner, Mr. Welch, respectfully requests that the petition for writ of *certiorari* be granted.

Respectfully submitted,

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Dated: October 24, 2005

409 F.3d 646

United States Court of Appeals,
Fourth Circuit.
Ricardo Antonio WELCH, Jr., Plaintiff-Appellant,
v.
UNITED STATES of America, Defendant-Appellee.
No. 04-1863.

Argued March 17, 2005.
Decided May 31, 2005.

ARGUED: Todd Michael Stenerson, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, D.C., for Appellant. Neil Ray White, Assistant United States Attorney, Office Of The United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF:** Debra A. Drake, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington, D.C., for Appellant. Thomas M. DiBiagio, United States Attorney, Baltimore, Maryland, for Appellee.

Before MICHAEL and DUNCAN, Circuit Judges, and FREDERICK P. STAMP, JR., United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge DUNCAN wrote the opinion, in which Judge MICHAEL and Judge STAMP joined.

OPINION

DUNCAN, Circuit Judge.

Ricardo Antonio Welch, Jr. was detained for 422 days under an immigration statute that this court later determined was unconstitutional as applied to him due to its

failure to provide for a bail hearing.[1] *Welch v. Ashcroft*, 293 F.3d 213 (4th Cir. 2002). Welch's successful challenge to his detention led to a court-ordered hearing at which an immigration judge released him on bail. Welch now brings this action, claiming that his detention constituted tortious false imprisonment under Maryland law, an action for which he contends the United States is liable under the Federal Tort Claims Act ("FTCA"). The district court dismissed Welch's claim for lack of subject matter jurisdiction, holding that the United States had not waived its sovereign immunity because his claim fell under the so-called "due care" exception to the FTCA. 28 U.S.C. § 2680(a). Because we agree with the district court and find that the due care exception applies to the facts of Welch's false imprisonment claim, we affirm.

I.

The material facts of this case are not in dispute. Welch is a native and citizen of Panama. At the age of ten, he entered the United States with his family and has been a permanent legal resident of this country since that time. While he was never granted citizenship, both of his parents and two of his three siblings are American citizens. Welch served in the United States Navy and Naval Reserve from 1986 through 1994, when he was honorably

[1] The Supreme Court subsequently rejected a constitutional challenge to the statute in another case, holding that mandatory detention of deportable aliens prior to removal proceedings is constitutionally permissible. *See Demore v. Hyung Joon Kim*, 538 U.S. 510, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003). This decision, however, was rendered after Welch's case was completed. Thus, for purposes of resolving the issue before us, the Fourth Circuit's decision remains the final authoritative ruling.

discharged. He is now a resident of the State of Maryland, where he lives with his wife, two sons, and step-daughter, all of whom are American citizens.

In 1993, Welch was arrested after being involved in an altercation on a basketball court. He was charged with a series of state felonies stemming from the incident, including assault and weapons charges. He pled guilty to the charges in 1994 and was sentenced to five years in prison. He ultimately served three years in a Maryland state correctional facility and was released in October, 1996.

After Welch's initial plea, the United States Department of Justice ("DOJ") instituted deportation proceedings against him under two subsections of the Immigration and Naturalization Act. See 8 U.S.C. § 1251(a)(2)(A)(iii) (authorizing deportation for conviction of an "aggravated felony"); 8 U.S.C. § 1251(a)(2)(C) (authorizing deportation for unlawful possession of a firearm).[2] In August, 1997, following his release, an immigration judge ordered Welch deported to Panama pursuant to § 1227(a)(2)(A)(iii). Welch appealed the order to the Board of Immigration Appeals, and the appeal was denied on July 8, 1998. In October, 1998, the DOJ took Welch into custody and placed him in detention pending his deportation. The removal process was delayed however, as the Immigration and Naturalization Service ("INS") did not receive the necessary paperwork from the Panama Consulate in order to complete deportation proceedings.

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[2] In 1996 Congress recodified § 241 of the Immigration and Naturalization Act, 8 U.S.C. § 1251 (1994), in substantially identical form at § 237 of the Act as amended, 8 U.S.C. § 1227 (2001). We will refer to the provisions under the new codification in the rest of the opinion.

While Welch remained in detention, on April 22, 1999, the state charges for which he had pled guilty were vacated in state court on collateral review. On that same day, Maryland entered into an agreement with Welch in which the felony charges were dropped and he instead pled guilty to six misdemeanor charges of simple assault and one misdemeanor charge of illegally wearing or carrying a handgun. The court imposed a sentence of less than one year and credited Welch for the time served previously, which resulted in no new time in detention.

The DOJ ceased its attempt to deport Welch based upon his prior felony convictions but moved to reopen the removal proceedings on the ground that the plea to the new firearm conviction rendered him deportable under 8 U.S.C. § 1227(a)(2)(C). On October 28, 1999, the Board of Immigration Appeals granted the motion. The DOJ continued to detain Welch based upon the Immigration and Naturalization Act's mandate of such detention pending a final removal determination. *See* 8 U.S.C. § 1226(c).

While in detention, Welch filed a petition for a writ of habeas corpus with the District Court of Maryland, contending that his indefinite detention without the possibility of bail by the DOJ violated his Fifth Amendment due process rights. At the same time, he applied for naturalization as a United States citizen. The district court granted the habeas petition, holding that § 1226(c) "violate[d] Welch's substantive due process right[s] . . . to receive a bail hearing in which a judge would determine his flight risk and threat to the community." *Welch,* 101 F.Supp.2d at 356. The court ordered that the DOJ provide Welch with a bail hearing, which an immigration judge conducted on June 7, 2000. After the hearing, the judge granted Welch his release.

The DOJ appealed that decision, and on June 19, 2002, this court affirmed the district court's decision, but on slightly different grounds. *Welch*, 293 F.3d at 218-28. While declining an invitation to rule on the constitutionality of § 1226(c) in all cases, we held that the provision was unconstitutional as applied to Welch. *Id.* Following this decision, on July 15, 2002, an immigration judge granted Welch's petition to cancel his removal proceedings. The government did not appeal, thus ending the threat of deportation.

On June 4, 2002, Welch presented an administrative claim to the INS seeking damages for his unlawful imprisonment from April 22, 1999 until June 7, 2000. His administrative claim was denied on April 23, 2003.[3] On October 15, 2003, Welch filed a complaint under the FTCA against the United States in the United States District Court for the District of Maryland, again alleging false imprisonment. The United States moved to dismiss under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction, alleging in part that the United States had not waived sovereign immunity under the FTCA for Welch's claim. The district court granted the motion to dismiss, and it is this decision we now review.

II.

We review a district court's dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction de novo. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir.1999).

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[3] On March 1, 2003, the INS was abolished and its functions were incorporated into the Department of Homeland Security. It was this agency that ultimately denied Welch's claim.

On appeal, Welch argues that his 422-day detention by the United States constituted false imprisonment under Maryland law. He contends that the FTCA provides a waiver of sovereign immunity by the United States for such false imprisonment claims, and that the district court erred in determining that Welch was unable to bring his claim due to the due care exemption to the FTCA.

III.

As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). All waivers of sovereign immunity must be "strictly construed . . . in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). For that reason, it is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists and that none of the statute's waiver exceptions apply to his particular claim. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir.1995). If the plaintiff fails to meet this burden, then the claim must be dismissed. *Medina v. United States*, 259 F.3d 220, 223 (4th Cir.2001).

The FTCA effects a limited waiver of the United States' sovereign immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The scope of this waiver is limited by a series of specific exceptions outlined in the Act, each of which is considered jurisdictional. *Medina*, 259 F.3d at 223-24. Two such exceptions apply here, and their inter-relationship controls

our analysis. Specifically, the waiver of sovereign immunity under the FTCA does not apply to:

> any claim based upon an act or omission of an employee of the Government exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The first clause of § 2680(a), the due care exception, prevents the United States from being held liable for actions of its officers undertaken while reasonably executing the mandates of a statute.

In addition to § 2680(a), § 2680(h) exempts claims for certain intentional torts, including those for false imprisonment, from the waiver of sovereign immunity. However, the statute was amended in 1974 to provide an exception to this exemption, stating that sovereign immunity *is* waived if certain intentional torts, including false imprisonment, are committed by an investigative or law enforcement officer of the United States. We have previously held that INS agents meet the criteria of an "investigative or law enforcement officer." *Medina*, 259 F.3d at 224.

Welch contends that because of § 2680(h), the due care exception of § 2680(a) does not bar his suit. He argues that § 2680(h)'s specific removal of immunity for false imprisonment claims against law enforcement officers of the United States exists independently of the § 2680(a) due care exception, and that § 2680(a) is thus not intended to apply to, or limit, § 2680(h) claims. He contends that congressional intent would be thwarted by applying the

due care exemption to such claims, as the specificity of the authorization of § 2680(h) immunity waivers indicates an intent that they should control. According to Welch, then, the United States has waived its sovereign immunity for false imprisonment claims, even if the law enforcement officer exercised due care.

Unfortunately for Welch, the authority in this circuit is to the contrary. In interpreting the "discretionary function" language of the second part of § 2680(a) in *Medina*, we concluded that subsection (a) applies to intentional torts under § 2680(h). 259 F.3d at 225-26. Following the reasoning of the D.C. Circuit, we held that when Congress amended § 2680(h) in 1974, it knew the effect of § 2680(a) and must have meant for its provisions to apply. *Id.* (discussing *Gray v. Bell*, 712 F.2d 490, 507 (D.C.Cir.1983)). While the new revisions to § 2680(h) allowed intentional tort claims against law enforcement officers, *Medina* decided that the exceptions to the Act already in existence were intended to remain in effect.

As noted, our determination in *Medina* was made in the context of subsection (a)'s "discretionary function" language. However, we see no compelling reason, and Welch points to none, for treating the parallel "due care" exception differently. We therefore hold that intentional tort claims authorized by § 2680(h) must overcome the § 2680(a) due care hurdle before sovereign immunity can be deemed waived.

IV.

Welch next argues that even if § 2680(a) applies to limit § 2680(h)'s authorized false imprisonment claims generally, the district court erred in determining that his

particular claim is barred by the due care exception. We disagree.

To determine whether the due care exception bars a particular claim, we apply a two-part analysis. *See Crumpton v. Stone,* 59 F.3d 1400, 1403 (D.C.Cir.1995). First, we determine whether the statute or regulation in question specifically proscribes a course of action for an officer to follow. *Id.* Second, if a specific action is mandated, we inquire as to whether the officer exercised due care in following the dictates of that statute or regulation. If due care was exercised, sovereign immunity has not been waived. *Id.*

In this case, the DOJ detained Welch under the mandate of § 1226(c)(1)(B). This provision states that the "Attorney General shall take into custody any alien who . . . is deportable by reason of having committed an offense covered in section . . . 1227(a)(2)(C) of this title." 8 U.S.C. § 1226(c)(1)(B). The language in this provision specifically prescribes a course of action to be followed by officers of the United States. The detention of anyone deportable due to a Section 1227(a)(2)(C) offense is mandatory; the "shall" language in the provision indicates that an individual officer cannot deviate from its enforcement. Once Welch was deemed deportable, the INS officers had no discretion in their actions. The decision to detain him was statutorily required, thus satisfying the first requirement of the due care exception.

Our second inquiry is simply whether the officers in question exercised due care in the execution of this statutorily prescribed duty. Welch does not claim that the INS officers carried out their responsibilities in an inappropriate manner, or in any way deviated from the statute's

requirements. Rather, his complaint is with the officers' decision to detain him in the first instance. However, this is a complaint regarding the statute itself, not with any of the particular officers' alleged deviation from its mandate. Absent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care. We therefore conclude that the prerequisites of § 2680(a) are met on these facts and that the United States' sovereign immunity is not waived.

Welch makes two arguments in response to the facial applicability of § 2680(a), neither of which is compelling. First, he contends that this court's earlier finding in that § 1226(c) was unconstitutional as applied to Welch precludes a determination that the INS agents acted in due care in executing it. Put simply, Welch contends that an unconstitutional regulation can never be said to have been executed with "due care."

This argument, however, ignores the plain language of § 2680(a). The exception states that sovereign immunity is not waived if an officer acts with "due care" in the execution of a statute or regulation "whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). The obvious purpose of the provision is to immunize the conduct of an officer from tort liability regardless of whether the statute under which he is proceeding is ultimately upheld. This is consistent with the aim of the FTCA, which is to create a remedy for certain plaintiffs who have been injured by the tortious execution of a particular law, not provide a venue in which to challenge the validity of that law. *See Dalehite v. United States,* 346 U.S. 15, 32-33, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). As the district court correctly noted, it is the purpose of the due care provision to "bar tests by tort action of the legality of statutes and regulations." *Borquez*

v. United States, 773 F.2d 1050, 1052 (9th Cir.1985) (internal quotation omitted). Welch identifies no violation of his constitutional rights resulting from the execution of § 1226(c) in a manner in which it was not intended. Rather, he simply argues that because the statute was later found unconstitutional as applied to him, due care could not have been used in the decision to enforce it. This argument is refuted by the plain language of the statute.

Welch's second argument fares no better. He claims that the mandatory nature of § 1226(c) prevents the utilization of any standard upon which it can be judged whether the government officials acted with due care. Welch is essentially arguing that statutes that mandate particular acts and leave no discretion in their execution may not be included within the due care exception as they leave no standard by which such care can be judged. Besides lacking a statutory basis for this conclusion, this argument is also incorrect. When a statute requires an official to take a particular action, the manner in which the act is undertaken may nevertheless be improper and thus performed without due care. For instance, the INS might have detained an individual under § 1226(c) for a crime that was not deportable, and thus its officers may have falsely imprisoned an individual by executing the statute improperly. In that instance, the claim would not be brought because of an alleged defect in the statute, but rather because of an alleged defect in how the statute has been executed. Here, however, Welch challenges the correct and proper enforcement of a mandatory statute. Such enforcement is, by its very nature, executed with due care. The mandatory nature of the enforcement does not discourage, but only reinforces, such a conclusion.

V.

The INS officers in this case appropriately enforced the required mandate of 8 U.S.C. § 1226(c). Welch has not claimed that they acted other than with due care in its execution and thus the United States has not waived its sovereign immunity for his claim. Absent such a waiver, the United States has not consented to be sued, and the district court's decision to dismiss the claim under Rule 12(b)(1) is

AFFIRMED.

316 F.Supp.2d 252

United States District Court,
D. Maryland.
Ricardo Antonio WELCH, Jr.
v.
UNITED STATES of America
No. CIV. CCB-03-2953.

May 4, 2004.

Todd M. Stenerson, Akin Gump Strauss Hauer and Feld LLP, Washington, DC, for Plaintiff.

Nadira Clarke, Office of the United States Attorney, Neil R White, Office of the United States Attorney, Baltimore, MD, for Defendant.

MEMORANDUM

BLAKE, District Judge.

Ricardo Antonio Welch, Jr. suffered a 422-day detention under an immigration statute that was unconstitutionally applied due to its failure to afford Mr. Welch a bail hearing. *See Welch v. Reno,* 101 F.Supp.2d 347 (D.Md.2000), *aff'd on other grounds, Welch v. Ashcroft,* 293 F.3d 213 (4th Cir.2002). Although the Supreme Court subsequently rejected a constitutional challenge to the statute in another case, *see Demore v. Hyung Joon Kim,* 538 U.S. 510, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003), Mr. Welch's litigation led to a court-ordered hearing at which an immigration judge released Mr. Welch on bail. Now Mr. Welch claims that his detention amounted to false imprisonment – a tort for which he says the United States should be liable under the Federal Tort Claims Act ("FTCA"). The government has filed a motion to dismiss under Federal

Rule of Civil Procedure 12(b)(1), arguing that Mr. Welch's claim is both barred by sovereign immunity under the so-called "due care" exception of the FTCA, *see* 28 U.S.C. § 2680(a), and untimely under the FTCA's two-year statute of limitations, *id.* § 2401(b). (Docket no. 10.) The motion has been fully briefed and no oral argument is necessary. Local Rule 105.6. Because I agree with the government on the first point, I will grant the government's motion and dismiss Mr. Welch's complaint without reaching the issue of limitations.

I.

The facts of this case have been stated in previous opinions, *see Welch v. Ashcroft*, 293 F.3d at 215-17; *Welch v. Reno*, 101 F.Supp.2d at 349-50, and need not be repeated in detail here. Mr. Welch was born in Panama, but has lived in the United States since age ten, and served honorably in the United States Navy and Naval Reserve. In 1994, the year he left the Naval Reserve, Mr. Welch pleaded guilty to felony charges in state court in Maryland, causing the United States Department of Justice ("DOJ") to seek his deportation. Following a successful collateral challenge to the conviction in state court, the DOJ ceased efforts to enforce a removal order based on the felony charges. On April 22, 1999, however, Mr. Welch entered a new guilty plea, this time to six misdemeanor charges based on the same incident. One count was a firearms offense that afforded grounds for deportation under 8 U.S.C. § 1227(a)(2)(C), so the Board of Immigration Appeals granted a DOJ petition to reopen Mr. Welch's case. The DOJ took Mr. Welch into custody immediately following the guilty plea because Mr. Welch qualified for mandatory detention pending final resolution of his

removal case under 8 U.S.C. § 1226(c). Although the state court that accepted the plea imposed a prison term of less than a year and credited Mr. Welch with time served for the entire sentence, Mr. Welch remained in the custody of the Immigration and Naturalization Service ("INS") for 422 days.

While in INS custody, Mr. Welch applied for naturalization and filed a habeas corpus petition with this court. On June 7, 2000, I ruled that § 1226(c) was unconstitutional and ordered that Mr. Welch receive a bail hearing. *See Welch v. Reno,* 101 F.Supp.2d at 353-56. On June 16, 2000, an immigration judge released Mr. Welch on $1,500 bond, the minimum bail allowable. On June 19, 2002, the Fourth Circuit affirmed my ruling, albeit on a narrower, "as applied" theory. *See Welch v. Ashcroft,* 293 F.3d at 218-28. The government did not seek certiorari.[1] In the meantime, an immigration judge had terminated Mr. Welch's reopened deportation case based on the likely success of his naturalization application and the presence of "exceptionally appealing humanitarian factors." The Board of Immigration Appeals reversed that ruling, but on July 15, 2002, the immigration judge granted a petition by Mr. Welch to cancel his removal proceedings. The government did not appeal, effectively removing the threat of deportation.

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[1] As I noted earlier, the Supreme Court subsequently accepted a case challenging the constitutionality of § 1226(c) and held that mandatory detention of deportable criminal aliens pending their removal proceedings is constitutionally permissible. *See Demore,* 538 U.S. at 526-33, 123 S.Ct. at 1720-22. The Fourth Circuit's decision, however, remains the final authoritative ruling with respect to Mr. Welch's habeas petition.

The current litigation began with a petition to the INS on June 4, 2002[2] asserting a tort claim of false imprisonment. The Bureaus of Immigration and Customs Enforcement and Citizenship and Immigration Services (two successors to the INS) denied Mr. Welch's claim on April 23, 2003, and Mr. Welch commenced this lawsuit on October 15, 2003.

II.

The government seeks dismissal of Mr. Welch's complaint on grounds that the United States has not waived its sovereign immunity with respect to Mr. Welch's claim. While the FTCA effects a waiver of sovereign immunity, the waiver is subject to strict limitations, and those limitations are considered jurisdictional. *See Medina v. United States*, 259 F.3d 220, 223-24 (4th Cir.2001). Mr. Welch, therefore, "bears the burden of persuasion and must establish an unequivocal waiver of immunity with respect to his claim." *Lumpkins v. United States*, 187 F.Supp.2d 535, 538 (D.Md.2002). As the government notes, Mr. Welch cannot meet this burden because his claim falls within an exception to the FTCA's general waiver of tort immunity.

Under the FTCA, sovereign immunity remains in effect with respect to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation,

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[2] The parties dispute whether the INS received Mr. Welch's filing on June 4, 2002 or June 5, 2002, but the dispute is of no importance to the issues under consideration. For the sake of argument, I assume the earlier date.

whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). The point of this so-called "due care" exception is "to preclude testing the legality of a statute or regulation by a tort action." *See Stewart v. United States,* 486 F.Supp. 178, 181 (C.D.Ill.1980); *see also* H.R.Rep. No. 101-1015, at 134-36 (1991) ("Nor is it desirable or intended that the constitutionality of legislation or the legality of a rule or regulation should be tested through the medium of a damage suit for tort." (quoting H.R.Rep. No. 2245, 77th Cong., 2d Sess., at 10 (1942))). Simply put, tort plaintiffs may challenge the manner in which government officers implement federal laws; they may not challenge the laws themselves. *See, e.g., Stewart,* 486 F.Supp. at 182 (concluding the due care exception was not applicable because the suit challenged the "manner in which the sale [of asbestos] was made, i.e. without warnings," rather than the "validity" of the statute authorizing the sale); *Crumpton v. United States,* 843 F.Supp. 751, 756-57 (D.D.C.1994) ("The 'due care' exception applies where the allegedly tortious conduct is comprised of a government employee's act or omission occurring in the course of executing statutory or regulatory provisions, where 'due care' has been exercised by the employee."); *Hydrogen Tech. Corp. v. United States,* 831 F.2d 1155, 1160-64 (1st Cir.1987) (applying the due care exception to claims based on the FBI's conduct of an investigation due to a lack of evidence of negligence).

The FTCA bars Mr. Welch's claim in this case because his claim, in effect, challenges the validity of a statute, not the manner of its execution. A hypothetical by Judge Ackerman of the Central District of Illinois illustrates this point:

> For example, if a statute provided that a postal inspector must open all mail with foreign postmarks, a

> person could not bring an action under the FTCA when the inspector executed this statute by opening foreign mail. Although the statute could be subject to challenge on other grounds, the FTCA could not be used to attack it because of the [due care] exception under § 2680(a). However, if the inspector did not exercise due care and opened all mail, foreign and domestic, there could be liability under the FTCA.

Stewart, 486 F.Supp. at 182. Mr. Welch's claim resembles the first of these two examples more closely than the second. His complaint is devoid of any indication of negligence – he has not alleged, for instance, that the government improperly determined that he qualified for detention (the equivalent of opening the wrong mail in the hypothetical), or that the manner of his arrest and detention failed to conform to applicable standards of care. Mr. Welch asks the court, rather, to find that his detention – an action mandated by a federal statute – was tortious under Maryland law. This theory does not fall within the FTCA's waiver of sovereign immunity. Because a valid federal statute preempts conflicting state law, *see, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1152-53 (4th Cir.1992), imposing liability on the grounds Mr. Welch asserts would require the court to test the validity of § 1226(c) – exactly what the due care exception forbids. *See Doe v. Stephens*, 851 F.2d 1457, 1461 (D.C.Cir.1988) ("[Section] 2680(a) specifically states that the mere invalidity of a statutory or regulatory stricture relied upon by a government employee is not tantamount to the absence of due care."). It makes no difference that this court previously invalidated the statute in question: as concerns FTCA liability, government agents are entitled to rely on applicable statutes and regulations, "whether or not [they] be valid." *See* 28 U.S.C. § 2680(a).

Attempting to evade these implications of the statutory text and legislative history, Mr. Welch argues that the FTCA's reference to due care means only that the government may not incur strict liability. The due care exception, he argues, has no bearing on intentional torts such as false imprisonment. This reading is implausible. While § 2680(h) indicates that law enforcement officers may be liable for false imprisonment, the Fourth Circuit has held that § 2680(a)'s exclusions apply even to torts encompassed by § 2680(h). *See Medina,* 259 F.3d at 224-25. As for § 2680(a), it is true that the due care exception precludes liability without fault, *see Laird v. Nelms,* 406 U.S. 797, 802-03, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972); *Dalehite v. United States,* 346 U.S. 15, 44-45, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), but the statute's plain language also bars claims like Mr. Welch's based on the non-negligent execution of a federal law. Indeed, the Fourth Circuit indicated as much in *Medina,* when it observed that an INS detainee could not recover under the FTCA "if the INS officials exercised due care in the execution of their powers under 8 U.S.C. § 1226," the very statute at issue here. *See* 259 F.3d at 224. Though the court based its decision on the discretionary function exception and did not reach the due care issue, its language suggests, at a minimum, that a claim like Mr. Welch's requires some showing of negligence.

Nor do *Rhoden v. United States,* 55 F.3d 428 (9th Cir.1995), and *Caban v. United States,* 671 F.2d 1230 (2d Cir.1982), two cases cited by Mr. Welch, help his position. To begin with, these cases did not even address the due care exception. *Rhoden* considered only whether there were unresolved issues of fact in a false imprisonment claim, *see Rhoden,* 55 F.3d at 431-32, and *Caban* reversed a decision based on the discretionary function exception,

see Caban, 671 F.2d at 1232-35. Furthermore, neither case involved a claim challenging the validity of a federal statute, as Mr. Welch's does. To the contrary, in both *Rhoden* and *Caban* the government's liability turned on whether federal officers had abided by federal standards; there was no suggestion that the agents should have disregarded those standards entirely. *See Rhoden*, 55 F.3d at 431 ("[T]he liability of the United States in the present case will be determined by whether the INS agents complied with the applicable federal standards when they detained [the plaintiff]."); *Caban*, 671 F.2d at 1235 ("It may very well be that because of the broad power given the immigration authorities, on these facts it will be very difficult for appellant to prove that a tort was committed.").

Thus, the statutory text, legislative history, and relevant case law all indicate that Mr. Welch's claim falls within the FTCA's due care exception. Because Mr. Welch has alleged nothing more than the dutiful execution of a mandatory federal statute, the FTCA makes no waiver of sovereign immunity with respect to his claim, and the Fourth Circuit's ruling that his detention was unconstitutional does not entitle him to collect damages for false imprisonment from the United States. Mr. Welch's complaint, therefore, will be dismissed.

A separate Order follows.

ORDER

For the reasons stated in the accompanying Memorandum, it is hereby Ordered that:

1. the defendant's motion to dismiss (docket no. 10) is **GRANTED**;

2. the complaint (docket no. 1) is **DISMISSED** under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction;

3. copies of this Order and the accompanying Memorandum shall be sent to counsel of record; and

4. the clerk of the court shall **CLOSE** this case.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 26, 2005

No. 04-1863
CA-03-2953-CCB

RICARDO ANTONIO WELCH, JR.

Plaintiff – Appellant

v.

UNITED STATES OF AMERICA

Defendant – Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Michael, Judge Duncan, and Judge Stamp.

For the Court,

/s/ Patricia S. Connor

28 U.S.C.A. § 1346

§ 1346. United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

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FILED
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SUPREME COURT, U.S.

No. 05-529

In the Supreme Court of the United States

RICARDO ANTONIO WELCH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, excludes from its waiver of sovereign immunity, *inter alia*, "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a). The FTCA also excludes from its waiver claims arising out of specified intentional torts including false imprisonment, but makes this intentional tort exception inapplicable to certain intentional tort claims with respect to the "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. 2680(h). The questions presented are:

1. Whether the due care exception set forth in 28 U.S.C. 2680(a) bars all tort actions against the United States when a government actor follows the dictates of a mandatory statute, regardless of whether the statute is subsequently declared unconstitutional as applied.

2. Whether an FTCA claim arising from an allegedly false imprisonment by a federal law enforcement officer is subject to the due care exception set forth in 28 U.S.C. 2680(a).

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In the Supreme Court of the United States

No. 05-529

RICARDO ANTONIO WELCH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 409 F.3d 646. The order of the district court (Pet. App. 13a-21a) is reported at 316 F. Supp. 2d 252.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2005. A petition for rehearing was denied on July 26, 2005 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on October 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, generally waives

the sovereign immunity of the United States with respect to torts of federal employees, acting within the scope of their employment, under circumstances where a private individual would be liable. Certain exceptions to the FTCA's waiver of sovereign immunity, and limitations on the substantive scope of the United States' liability, are set forth in Section 2680. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671-2680). The two exceptions at issue in this case are the due care exception in Section 2680(a) and the intentional tort exception in Section 2680(h).

The due care exception provides that the FTCA is not applicable to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a). The intentional tort exception generally provides that the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). In 1974, however, Congress added an exception to the intentional tort exception, known as the "law enforcement proviso." See Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50. Under that proviso, with regard to the acts or omissions of federal investigative or law enforcement officers, "the provisions of this chapter [*i.e.*, 28 U.S.C. 2671-2680] and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

2. Petitioner Ricardo Welch is a citizen of Panama who has been a permanent legal resident of the United States since he was ten years old. Pet. App. 2a. In 1994, petitioner pleaded guilty to several state felonies, including assault and weapons charges, and he was sentenced to five years in prison. *Id.* at 3a. Petitioner was released in October 1996 after serving three years in a Maryland state correctional facility. *Ibid.*

In August 1997, an immigration judge ordered petitioner deported to Panama pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), which authorizes deportation of an alien who is convicted of an "aggravated felony." Pet. App. 3a. In October 1998, after the Board of Immigration Appeals denied petitioner's appeal and the removal order thereby became final, the Department of Justice (DOJ) took petitioner into custody pending his deportation. *Ibid*; see 8 U.S.C. 1231(a) (providing for post-final-order detention pending deportation).[1]

On April 22, 1999, while petitioner remained in detention, the state charges for which he had pleaded guilty were vacated on collateral review, and he pleaded guilty instead to several misdemeanor charges, including one charge of illegally wearing or carrying a handgun. Pet. App. 4a. DOJ subsequently moved to reopen petitioner's removal proceedings on the ground that, although the vacated felony charges no longer supported deportation, he was deportable as a result of his new plea agreement pursuant to 8 U.S.C. 1227(a)(2)(C), which authorizes deportation for unlawful possession of a firearm. Pet. App. 4a. On October 28, 1999, the Board of Immigration Appeals granted DOJ's motion to reopen the deportation proceedings. *Ibid.*

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[1] This period of detention is not at issue in this Court.

Meanwhile, because petitioner was now back in removal proceedings, DOJ detained petitioner "based upon the Immigration and [Nationality] Act's mandate of such detention perding a final removal determination." Pet. App. 4a (citing 8 U.S.C. 1226(c)). Section 1226(c) requires, in relevant part, that "[t]he Attorney General *shall* take into custody any alien who * * * is deportable by reason of having committed any offense covered in section 1227(a)(2) * * *(C) * * * of this title." 8 U.S.C. 1226(c)(1) (emphasis added). The Attorney General may release an alien taken into custody under Section 1226(c)(1) "*only if* the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (emphases added).

On June 6, 2000, in a separate proceeding, the United States District Court for the District of Maryland granted petitioner's petition, pursuant to 28 U.S.C. 2241, for a writ of habeas corpus. See *Welch* v. *Reno*, 101 F. Supp. 2d 347 (D. Md. 2000), aff'd, 293 F.3d 213 (4th Cir. 2002). The district court held that petitioner's mandatory detention under 8 U.S.C. 1226(c) violated what it found to be petitioner's substantive due process right to receive a bail hearing, and it ordered the Immigration and Naturalization Service (INS) to provide petitioner with a bail hearing before an immigration judge to de-

termine his flight risk and threat to the community. *Id.* at 356. The immigration judge thereafter conducted a bail hearing and ordered petitioner released. Pet. App. 4a.

The Fourth Circuit affirmed the district court's decision in petitioner's habeas case. Although the Fourth Circuit rejected petitioner's facial challenge to 8 U.S.C. 1226(c), it held that the provision was unconstitutional as applied to petitioner. *Welch* v. *Ashcroft*, 293 F.3d 213, 223-227 (4th Cir. 2002). In so holding, however, the court of appeals observed that petitioner's "14-month detention without a bond hearing did not contravene the dictates of § 236(c)." *Id.* at 228. In a separate case, this Court subsequently rejected a constitutional challenge to 8 U.S.C. 1226(c), holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons * * * be detained for the brief period necessary for their removal proceedings." *Demore* v. *Kim*, 538 U.S. 510, 513 (2003).

On July 15, 2002, an immigration judge granted petitioner's application for the discretionary relief of cancellation of removal, and the INS did not appeal, effectively ending the threat of deportation. Pet. App. 5a.

3. On June 4, 2002, petitioner presented an administrative claim to the INS, seeking damages for his allegedly unlawful imprisonment from April 22, 1999, until June 7, 2000. Pet. App. 5a. On April 23, 2003, petitioner's administrative claim was denied. *Ibid.*

On October 15, 2003, petitioner filed a complaint against the United States under the FTCA, alleging false imprisonment. Pet. App. 5a. The United States moved to dismiss for lack of subject matter jurisdiction

because petitioner failed to present a written claim to the appropriate federal agency within two years after his alleged FTCA claim accrued, see 28 U.S.C. 2401(b), and because his claim was barred by the FTCA's due care exception, 28 U.S.C. 2680(a). Pet. App. 5a-7a, 14a.

The district court granted the motion to dismiss. Pet. App. 13a-21a. The court held that the due care exception barred petitioner's claim for money damages. The court concluded that, because petitioner "has alleged nothing more than the dutiful execution of a mandatory federal statute, the FTCA makes no waiver of sovereign immunity with respect to his claim." *Id.* at 20a. Given that holding, the district court did not decide whether petitioner had presented his claim within two years of its accrual. *Id.* at 14a.

The court of appeals affirmed. Pet. App. 1a-12a. The court reasoned that the text of 8 U.S.C. 1226(c)(1)(B) "prescribes a course of action to be followed by officers of the United States" and that "an individual officer cannot deviate from its enforcement." Pet. App. 9a. Because petitioner made no allegation that the officers carried out the mandate of Section 1226(c)(1)(B) "in an inappropriate manner, or in any way deviated from the statute's requirements," the court concluded that "it cannot be said that the officers acted with anything other than due care." *Id.* at 9a-10a. The court thus held that the officers' conduct fell squarely within the due care exception and that the United States had not waived its sovereign immunity with respect to petitioner's claim for money damages. *Ibid.* That was so, the court of appeals concluded, even though it had held in petitioner's habeas proceeding that Section 1226(c)(1)(B) was unconstitutional as applied to petitioner, because the due care exception expressly ap-

plies "whether or not such statute or regulation be valid." *Id.* at 10a (quoting 28 U.S.C. 2680(a)).

The court of appeals also rejected petitioner's contention that the law enforcement proviso of 28 U.S.C. 2680(h) rendered the due care exception inapplicable to claims based upon intentional torts by law enforcement officers. Pet. App. 7a-8a. The court held that when Congress amended Section 2680(h) in 1974 to permit certain intentional tort claims based upon the conduct of law enforcement officers, "it knew the effect of § 2680(a)" and "the exceptions to the Act already in existence were intended to remain in effect." *Id.* at 8a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. The petition for a writ of certiorari should be denied.

1. As the courts below concluded, the plain text of the FTCA's due care exception bars petitioner's claim. As noted, that provision excludes from the United States' waiver of its sovereign immunity "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a).

Petitioner's claim falls squarely within this exception. His false imprisonment claim is based on his detention by federal officers, without the opportunity for a bail hearing, pending the resolution of his removal proceedings. But the federal officers who detained petitioner were executing the terms of a federal statute, 8 U.S.C. 1226(c), that mandated that they detain petitioner without a bail hearing. Section 1226(c)(1)(B) pro-

vides that the "Attorney General *shall* take into custody any alien who * * * is deportable by reason of having committed an offense covered in section 1227(a)(2) * * * (C)," which authorizes deportation for unlawful possession of a firearm. 8 U.S.C. 1226(c)(1)(B) (emphasis added). The statute further provides that the Attorney General may release an alien taken into custody only under certain conditions that do not apply—and petitioner does not contend apply—to petitioner. See 8 U.S.C. 1226(c)(2). As the Fourth Circuit recognized on appeal in petitioner's habeas case, Section 1226(c) "categorically bars the Attorney General from 'releas[ing] from custody' any alien convicted of an aggravated felony or firearm offense who is not in the federal witness protection program." *Welch*, 293 F.3d at 217. Thus, as the court of appeals held here, petitioner's detention without a bail hearing was "statutorily required," and the federal officers had no discretion to deviate from that statutory mandate. Pet. App. 9a-10a.

Moreover, the federal officers executed their statutorily prescribed obligation to detain petitioner "with due care" under 28 U.S.C. 2680(a). Indeed, petitioner does not contend that the officers failed to comply with the terms of the statute. Pet. App. 9a-10a; see *Welch*, 293 F.3d at 228 (noting, in petitioner's habeas case, that his detention "did not contravene the dictates of § 236(c)"). Rather, petitioner contends that the officers failed to act with due care because, even though the officers followed the statutory mandate, the detention was "outside the bounds of acceptable constitutional conduct." Pet. 20.

As the court of appeals concluded (Pet. App. 10a-11a), the plain text of the statute forecloses that argument. The due care exception expressly applies "whether or not" the statute the federal officers are exe-

cuting is "valid." 28 U.S.C. 2680(a). By its terms, this provision expressly retains the United States' sovereign immunity as to claims for money damages that are based upon acts or omissions of federal officers who are faithfully performing their obligations in accordance with federal statutes or regulations, even if those statutes or regulations are subsequently found to be invalid. Accordingly, the fact that the Fourth Circuit held, subsequent to petitioner's detention, that Section 1226(c) was unconstitutional (*i.e.*, invalid) as applied to petitioner cannot support petitioner's FTCA claim. Although petitioner asserts that courts "have struggled with when and how to apply" the due care exception, Pet. 19, he cites no case in which a court's application of the due care exception conflicts with the decision below.[2]

Indeed, if petitioner's reading of the due care exception were correct, challenges to the constitutionality of statutes could be brought by way of an FTCA action.[3]

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[2] There is no merit to petitioner's suggestion (Pet. 21-22) that application of the due care exception to the enforcement of an unconstitutional statute conflicts with certain decisions holding that the discretionary function exception does not apply to unconstitutional conduct. Those decisions are based upon the view that "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (quoting *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3d Cir.), cert. denied, 487 U.S. 1235 (1988)). Whatever the merit or limits of that principle, it has no application to the non-discretionary conduct at issue in this case or to the distinct due care exception in Section 2680(a), which applies whether or not the statute pursuant to which the officer acted is unconstitutional.

[3] As petitioner notes (Pet. 26-27), he first challenged the constitutionality of Section 1226(c) through a petition for a writ of habeas corpus. At bottom, however, as the court of appeals recognized, petitioner's complaint in this FTCA action is "with the statute itself." Pet. App. 10a.

But, as this Court has made clear, the due care exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953); see also *United States* v. *Gaubert*, 499 U.S. 315, 336 (1991) (Scalia, J., concurring) (noting that the Court has construed the due care exception "to mean that regulations '[can]not be attacked by claimants under the Act'") (quoting *Dalehite*, 346 U.S. at 42); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (explaining that it is not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort").

In effect, petitioner is arguing for an interpretation of the FTCA under which, for the United States to avoid tort liability, federal officers would have to substitute their judgment for that of Congress, and violate the requirements of binding federal statutes and regulations, whenever they believe those requirements might be unconstitutional as applied to a given individual. Nothing in the FTCA supports such an outcome, nor is there any reason to believe that Congress intended federal officers in the field to second-guess its clear directives. Cf. *Cheek* v. *United States*, 498 U.S. 192, 206 (1991) (concluding that Congress did not contemplate that a taxpayer who believes the tax laws are unconstitutional "could ignore the duties imposed upon him" and refuse to pay his taxes). Petitioner was afforded an opportunity to challenge the constitutionality of Section 1226(c), and he successfully obtained judicial relief and thereby secured his release. But the text of the FTCA forecloses his attempt to obtain money damages for the actions of Executive Branch officers who were complying with

their obligation faithfully to execute laws enacted by Congress.[4]

2. a. The court of appeals likewise correctly concluded that the law enforcement proviso of 28 U.S.C. 2680(h) does not render inapplicable the due care excep-

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[4] As the United States suggested in the district court (but did not press at this stage of the proceedings), see, *e.g.*, C.A. App. 56, 115, there is a substantial question whether the Fourth Circuit's holding in petitioner's habeas case that Section 1226(c) was unconstitutional as applied to petitioner survives this Court's subsequent decision in *Demore*. As noted above, *Demore* upheld Section 1226(c) against constitutional challenge. 538 U.S. at 513. Although the court below stated without analysis that its decision in petitioner's habeas case "remains the final authoritative ruling" with respect to this case, Pet. App. 2a n.1, this Court's intervening decision in *Demore* represents a change in the controlling law such that neither preclusion principles nor the "law of the case" doctrine bars reconsideration of the earlier decision in the habeas case in this new, separate action for money damages. See, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 600 (1948); *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Moreover, although the United States cited the Fourth Circuit's decision in petitioner's habeas case in its brief in *Demore* as illustrating that "exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis," Gov't Br. at 48-49, *Demore*, *supra* (No. 01-1491), the United States did not state (contrary to petitioner's suggestion, see Pet. 4) that petitioner's as-applied challenge was a meritorious one. Indeed, the United States criticized the approach endorsed by two of the members of the Fourth Circuit panel—under which there would be a rebuttable presumption that detention could not last beyond six months—as "lack[ing] a specific foundation in the text or history of Section 1226(c)." Gov't Br. at 48, *Demore*, *supra*. Furthermore, to the extent an as-applied challenge would lie under *Demore* in truly exceptional cases, it would be necessary for the alien to show a significant departure from the time that reasonably would be expected to conduct the hearings and appeals that were called for in the particular case, and to exclude from consideration any delays attributable to the alien. The Fourth Circuit did not conduct any such analysis in its decision on the habeas appeal.

tion of 28 U.S.C. 2680(a). Indeed, the plain text and structure of the FTCA preclude petitioner's interpretation of the proviso. When Congress enacted the law enforcement proviso in 1974, it placed the proviso *within* the intentional tort exception, Section 2680(h).[5] Although provisos sometimes have a broader import, it is customary to use a proviso to refer only to things covered by the preceding clause. See *United States* v. *Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); 82 C.J.S. *Statutes* § 370, at 494 (1999) ("The operation of a proviso usually is confined to the clause or distinct portion of the enactment which immediately precedes it, or to which it pertains, or is attached.") (footnotes omitted); see also *Alaska* v. *United States*, 125 S. Ct. 2137, 2159 (2005), judgment, 2006 WL 152590 (entered Jan. 23, 2006). Here, the text and structure of Section 2680 strongly reinforce the conclusion that the proviso has the customary scope of modifying only the preceding clause.

Significantly, Congress did not make the law enforcement proviso an exception to any of the other exceptions that are contained in Section 2680, such as the due care exception, which it reasonably could have done if it had

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[5] Section 2680(h) excepts from the FTCA's provisions: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

intended to modify those preexisting exceptions as well. Moreover, the text of the proviso relates only to the preceding clause of subsection (h) and, referring specifically to some (but not all) of the intentional torts excepted in that prior clause, negates the prior clause's application in certain defined instances. See 28 U.S.C. 2680(h). And finally, the proviso expressly states that all provisions of "this chapter"—which includes the due care exception in Section 2680(a)—shall apply to claims brought under the proviso. 28 U.S.C. 2680(h). In short, given its text and placement in the statute, the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)—the clause excepting certain intentional torts from the FTCA's coverage.

To read the law enforcement proviso more broadly, as a limitation not only upon the intentional tort exception but also upon the other Section 2680 exceptions, would allow tort suits against the United States that Congress plainly intended to bar. For example, there is nothing in the language or structure of the law enforcement proviso that suggests Congress intended to permit any intentional tort suits with respect to acts or omissions of law enforcement officers for claims arising in a foreign country. Such a claim, even if it fell within one of the specified intentional tort claims permitted by the law enforcement proviso, would nevertheless be barred by Section 2680(k), which prohibits all tort claims "arising in a foreign country." Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 699-712 (2004) (holding that foreign country exception barred FTCA claim for false arrest); cf. also *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the "detention of goods" exception to the

FTCA set forth in Section 2680(c)), cert. denied, 515 U.S. 1144 (1995); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the discretionary function exception to the FTCA), cert. denied, 465 U.S. 1100 (1984); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (same).

Moreover, contrary to petitioner's assertion (Pet. 16-18), reading the law enforcement proviso as an exception only to the intentional tort exception of Section 2680(h) does not render the law enforcement proviso meaningless. Rather, as petitioner appears to recognize (Pet. 18), it simply means that *some* claims that fall within the law enforcement proviso will nevertheless be barred by some other provision of the FTCA.

b. Petitioner cites no court of appeals decision that conflicts with the decision below. Indeed, petitioner cites no other decision by any other court of appeals that even addresses the question presented here: whether the due care exception of Section 2680(a) applies if the law enforcement proviso of Section 2680(h) also applies. To the contrary, petitioner candidly acknowledges that "the decision below is the *first* case to analyze the law enforcement proviso's interplay with § 2680(a)'s due care provision." Pet. 8-9 (emphasis added).

Petitioner nevertheless seeks this Court's review based on an asserted conflict (Pet. 9-15) among the courts of appeals as to whether the *discretionary function* exception of Section 2680(a) applies where the law enforcement proviso of Section 2680(h) also applies. Even if this Court was inclined to review the interplay between the discretionary function exception and the law enforcement proviso, this case does not present that question. The due care and discretionary function ex-

ceptions, while set forth in the same subsection, pertain to different types of conduct. See 28 U.S.C. 2680(a). As explained above, the due care exception applies when a federal employee is executing a federal statute or regulation. The discretionary function exception, by contrast, applies when a federal employee is acting pursuant to discretion conferred upon him or her, such that no mandatory federal statute, regulation, or policy prescribes a specific course of action. *E.g.*, *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988) (discretionary function exception does not apply where mandatory and specific statutes or regulations leave no "element of judgment or choice" such that "[t]he employee has no rightful option but to adhere to the directive").

More importantly, the reasoning in the cases upon which petitioner relies as purportedly in conflict with the decision below turns on the nature of the discretionary function exception. For example, in refusing to hold that the discretionary-function hurdle must be met in all cases, the Fifth Circuit in *Sutton* v. *United States*, 819 F.2d 1289 (5th Cir. 1987), applied this Court's decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), regarding the scope of the discretionary function exception. See *Sutton*, 819 F.2d at 1294, 1298. Moreover the *Sutton* court relied upon its concern that the discretionary function exception could "result in judicial repeal of the law enforcement proviso" with respect to malicious prosecution cases, which often involve discretionary acts and for which the Fifth Circuit believed Congress intended to allow an FTCA claim. *Id.* at 1295; contra *Gray*, 712 F.2d at 507 (finding "no serious incongruity between" the immunity afforded under the discretionary function exception and the waiver of immunity set forth

in the law enforcement proviso). But the *Sutton* court's reasoning whatever its merit in the context of the discretionary function exception, has no application with respect to the due care exception, which is triggered not by the exercise of discretion but by the execution of a federal statute or regulation.[6]

But even if this were a case involving the interplay between the discretionary function exception and the law enforcement proviso, further review would be unwarranted. Although there is some disagreement in reasoning among the circuits as to the interrelationship of those two FTCA provisions, that disagreement does not rise to the level of a conflict warranting review by this Court at this time.

The D.C. Circuit decision cited by petitioner is fully in accord with the rule in the Fourth Circuit, and thus presents no conflict. See Pet. App. 8a.[7] Likewise, the decisions of the Second and Third Circuits cited by petitioner do not establish a conflict. The Second Circuit, by petitioner's own characterization, merely "intimated" in *Caban* v. *United States*, 671 F.2d 1230 (1982), "that § 2680(a) should not bar a valid § 2680(h) claim." Pet. 13. And, as petitioner also recognizes, the Third Circuit

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[6] To be sure, the court below saw no reason for treating the due care exception differently than the discretionary function exception, see Pet. App. 8a, but that does not mean that other circuits would apply their different reasoning with respect to the discretionary function exception to a due-care case such as this one.

[7] Compare *Gray*, 712 F.2d at 507 ("We * * * reject the contention that intentional tort claims based on the acts of 'investigative or law enforcement officer[s]' may never come within the purview of the discretionary function exception to section 2680(a)") with *Medina*, 259 F.3d at 225 ("[W]e are convinced that the D.C. Circuit resolved this question correctly in its decision in *Gray*."). Accord *Gasho*, 39 F.3d at 1433, 1435-1436.

in *Pooler* v. *United States*, 787 F.2d 868, cert. denied, 479 U.S. 849 (1986), "did not specifically answer whether § 2680(a)'s discretionary function exception presents a hurdle to § 2680(h) claims generally." Pet. 15. Rather, the Second Circuit held in *Caban* that the alleged acts did not fall within the discretionary function exception, see 671 F.2d at 1233, and the Third Circuit held in *Pooler* that the claims before it did not fall within the terms of the law enforcement proviso, see 787 F.2d at 872. Finally, although the Fifth Circuit's decision in *Sutton*, which was rendered more than 18 years ago, contains reasoning that is at odds with the approach taken by the Fourth and D.C. Circuits, the Fifth Circuit did not purport to "declare categorically * * * the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." *Sutton*, 819 F.2d at 1298.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

RICARDO ANTONIO WELCH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

The Government tries to artificially deconstruct § 2680(a) into two separate and distinct sections of the FTCA in an effort to avoid addressing the conflict that this Petition presents. The Government's position is without legal support and should be rejected. The Court should grant *certiorari* to resolve the conflict among the Courts of Appeals as to whether a claim established under the FTCA's law enforcement proviso must first overcome the hurdle of § 2680(a)'s general exceptions to the United States' waiver of sovereign immunity. The Fourth Circuit held that Mr. Welch's false imprisonment claim, even if established under § 2680(h), must first overcome § 2680(a)'s general exceptions. (Pet. App. at 8a.) This decision exacerbates the disagreement among the Courts of Appeals regarding the proper interplay between the law enforcement proviso and § 2680(a). In particular, the Fourth Circuit decision is in conflict with Fifth Circuit precedent. *See Sutton v. United States*, 819 F.2d 1289, 1296 (5th Cir. 1987) ("The government is to be liable . . . *in any case* in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the [law enforcement] proviso.").

This case provides an ideal vehicle for the Court to address and resolve this conflict. The Petition presents a clear and undisputed factual record, and thus affords a straightforward review of the legal issues. Moreover, earlier this term during oral argument in *United States v. Olson*, the Court questioned the function that the due care provision serves. *See* Transcript of Oral Argument at 15-16, *Olson*, 126 S. Ct. 510 (2005). In that regard, Mr. Welch's Petition presents the opportunity to address that question and also presents issues that are more prevalent

than, and at least as important as, the three FTCA cases already heard by the Court this term. Absent resolution of the conflict presented here, the federal judiciary will continue to expend resources struggling to interpret the interplay between law enforcement proviso and § 2680(a)'s general exceptions. (Pet. at 9-10.)

A. Mr. Welch Has Established a False Imprisonment Claim under § 2680(h)'s Law Enforcement Proviso and Thus Is Not Testing the Validity of INA § 236(c) or Pursuing a Constitutional Tort

The Government's entire argument is based on its assertion that Mr. Welch's claim "falls squarely within" § 2680(a)'s due care exception, assuming away the very question this Petition presents, *i.e.*, whether § 2680(a) general exceptions apply at all. (Opp. at 7.) In so doing, the Government considers it irrelevant that Mr. Welch's detention falls squarely within § 2680(h)'s law enforcement proviso. Mr. Welch has satisfied all the elements of a false imprisonment tort under Maryland law. (Pet. at 16.) Mr. Welch's 422-day detention was unlawful because it was without "legal justification," and the Government does not argue otherwise.[1]

In pursuing his false imprisonment claim, Mr. Welch is not using the FTCA to test the validity of INA § 236(c) or seeking recovery for a constitutional tort simply because

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[1] The Government's suggestion that its failure to petition for *certiorari* in *Welch I* does not preclude them from re-litigating the constitutionality of INA § 236(c) as applied to Mr. Welch is without merit. (Opp. at 11 n.4.)

the statute was found unconstitutional.[2] (Opp. at 10.) ("[I]f petitioner's reading of the due care exception were correct, challenges to the constitutionality of statutes could be brought by way of an FTCA action."). Indeed, "no authority" exists that "would support a holding that claims which are otherwise actionable under state law are prohibited under the FTCA simply because the challenged conduct also violates the Constitution. In fact, case law is to the contrary." *See Garcia v. United States*, 896 F. Supp. 467, 475 (E.D. Pa. 1995) (citing *Rhoden v. United States*, 55 F.3d 428, 432 n.5 (9th Cir. 1995) (per curium)); *Carlson v. Green*, 466 U.S. 14, 19-20, 23 (1980) (noting that same conduct might give rise to both Bivens and FTCA actions) (other citations omitted)). To the extent that the Fourth Circuit's decision bars a FTCA claim because it in part arises from unconstitutional conduct, it creates conflicts with the authority cited above.

B. Section 2680(a) Does Not Shield the United States from Liability for Unconstitutional Conduct

The Government's, and the Fourth Circuit's, reliance on the plain language rule to interpret § 2680(a)'s due care provision is misplaced. Acting with due care does not mean simply following the mandates of a statute. *See* Pet. at 23-25. The Government's conclusory contention that the due care provision bars Mr. Welch's claim sidesteps two critical points, whether conduct that establishes a § 2680(h) claim: (1) must overcome § 2680(a)'s general exceptions in the first instance; and (2) if so, whether such a claim can be barred by § 2680(a)'s due care provision where the underlying

[2] Indeed, Mr. Welch's false imprisonment claim accrued when he proved himself bailable, not when he was provided a bail hearing.

conduct also violates substantive constitutional rights. Indeed, this Petition seeks to have the Court resolve these two precise issues.

Courts repeatedly have deemed sovereign immunity waived, and the United States liable, when constitutional rights are violated in a manner that also constitutes an intentional tort under the law enforcement proviso. *See* Pet. at 21 n.6. Despite the violation of Mr. Welch's constitutional rights, the Government declares that in this case "the federal officers executed their statutorily prescribed obligation to detain petitioner 'with due care' under 28 U.S.C. 2680(a)." (Opp. at 8.) The Government acknowledges (albeit in a footnote) that courts have refused to allow § 2680(a)'s discretionary function provision to bar a claim based on unconstitutional conduct, as "federal officers do not possess discretion to violate constitutional rights or federal statutes." (Opp. at 9 n.2) (quoting *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (citation omitted)).

The Government argues, however, that this precedent has "no application" to the present claim because § 2680(a)'s due care provision "applies whether or not the statute pursuant to which the officer acted is unconstitutional." (Opp. at 9 n.2.) The Government cites no authority for that contention, and ignores § 2680(a)'s conditional phrase "exercising due care." Instead, the Government improperly focuses on the phrase "whether or not such statute or regulation be valid." By conflating these two phrases, the Government equates the due care clause with barring all claims involving the non-negligent execution of a statute. Such a position is without authority and has the effect of adding a negligence element to Mr. Welch's intentional tort claim. *See* Pet. at 26.

C. The Government's Argument Regarding the Placement of the Law Enforcement Proviso in § 2680(h) Is Fundamentally Flawed

Contrary to the Government's assertion, Mr. Welch is not seeking a categorical rule with respect to how § 2680(h)'s law enforcement proviso interplays with *all* of § 2680's exceptions to the United States' waiver of sovereign immunity. In fact, other than § 2680(a), all of the other subsections in § 2680 provide for specific exceptions to the United States' waiver of sovereign immunity. How to reconcile a *specific* waiver of sovereign immunity with *specific* exceptions to the waiver of sovereign immunity in §§ 2680(b)-2680(n) is not the matter before the Court.[3] The question presented here is how § 2680(a)'s *general* exceptions should be reconciled with a claim brought under § 2680(h).

In an effort to avoid this question, the Government maintains that "the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)." (Opp. at 13.) Such an interpretation is implausible. The Government claims that if Congress wanted to "make the law enforcement proviso an exception to any of the other exceptions that are contained in Section 2680," it

[3] That the Government uses the specific waiver of sovereign immunity in § 2680(k) to illustrate its erroneous contention is a thinly-veiled attempt to alarm the Court with the specter of alleged terrorists recovering damages from the United States for intentional harm suffered in foreign countries. (Opp. at 13) ("[N]othing in the language or structure of the law enforcement proviso that suggests Congress intended to permit any intentional tort suits with respect to acts or omissions of law enforcement officers for claims arising in a foreign country.") As noted above, this case does not present how § 2680(h)'s law enforcement proviso should be reconciled with §§ 2680(b)-2680(n)'s specific exceptions to the waiver of sovereign immunity.

could have done so by "modify[ing] those preexisting exceptions as well." (Opp. at 13.) The law enforcement proviso, however, provides for the specific waiver of sovereign immunity for six enumerated intentional torts. Its placement in § 2680(h) is logical; Congress' unequivocal intent was to carve out an exception to the blanket prohibition for intentional torts in § 2680(h).

Section 2680(h)'s law enforcement proviso is unique in that it is the only subsection in § 2680 that actually *waives* the United States' sovereign immunity, as opposed to preserving it. Section 2680(h) states that "with regard to acts or omissions" of federal law enforcement officers, "the provisions of this chapter and section 1346(b) *shall apply to any claim* arising, on or after the date of this proviso" to certain intentional torts. (Pet. App. at 25a) (emphasis added). By explicitly referencing § 1346(b), it is clear that Congress meant for the law enforcement proviso, the FTCA's *only* specific *waiver* of sovereign immunity, to apply to any "injury" caused by a "wrongful act" of a government actor.

As the Fifth Circuit noted, it can be "safely presume[d]" that Congress was aware of § 2680(a)'s general exceptions when Congress amended § 2680(h). *Sutton v. United States*, 819 F.2d 1289, 1294-95 (5th Cir. 1987); *see also* Pet. at 17 & 17 n.5. Such an interpretation is in accord with legislative intent. The Senate expressly intended that § 2680(h)'s law enforcement proviso would apply to "any case" in which law enforcement officials commit intentional torts "while acting within the scope of

his employment or under color of Federal law." S. Rep. No. 93-588, at 2791 (1974), *reprinted in* U.S.C.C.A.N. 2789.[4]

D. There Is No Consensus Regarding the Interplay of § 2680(a) and § 2680(h)

Since 1974, when Congress amended FTCA § 2680(h) to waive the United States' sovereign immunity for certain intentional torts committed by law enforcement officers, courts have differed on how to analyze its interplay with § 2680(a)'s general exceptions to the waiver of sovereign immunity. *See* Pet. at 9-15. In an attempt to dismiss the conflict among the Courts of Appeals, the Government artificially deconstructs § 2680(a)'s general exceptions, treating the discretionary function clause and due care clause as if they are two separate, distinct sections of the FTCA.

However, the Fourth Circuit rejected any distinction between § 2680(a)'s general exceptions and held that there was "no compelling reason . . . for treating the parallel 'due

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[4] This case is not, and never has been, about the personal liability of federal officers. Contrary to the Government's assertion, Mr. Welch is not "arguing for an interpretation of the FTCA under which . . . federal officers would have to substitute their judgment for that of Congress . . . ." (Opp. at 10.) The fundamental purpose of the FTCA is to hold the *United States* liable for the negligent or "wrongful act or omission" of a government employee "acting within the scope of his office or employment" where the United States, "if a private person, would be liable" under the law of the state "where the act or omission occurred." (Pet. App. at 24a.) Mr. Welch is seeking a remedy from the United States for the "wrongful act" inflicted upon him by a government official who was "acting within the scope of his office or employment." *See Sutton*, 819 F.2d at 1292 (noting that the FTCA was "designed 'to afford easy and simple access to the federal courts for persons injured by the activities of government' ") (citations omitted).

care' exception differently [from the discretionary function exception]." (Pet. App. at 8a.) Such treatment is appropriate because § 2680(a) contains both exceptions and thus any § 2680(a) analysis is one two-pronged inquiry, not two separate inquiries.[5] Although the Government acknowledged the Fourth Circuit's holding, it dismissed out-of-hand the consequential implications of the Fourth Circuit's decision. (Opp. at 16 n.6) ("[T]hat does not mean that other circuits would apply their different reasoning with respect to the discretionary function exception to a due-care case . . . .").

The Government's attempt to hide behind its strained deconstruction of § 2680(a) to minimize the disagreement among the Courts of Appeals must fail. Although the Government imposes its own judgment on the extent of the conflict among the Courts of Appeals, stating that the "disagreement does not rise to the level of a conflict warranting review," (Opp. at 16), the fact remains that a conflict *does* exist. The Government, moreover, trivializes the direct conflict the decision below has with the Fifth Circuit's decision in *Sutton*, 819 F.2d 1289, by emphasizing that it was "rendered more than 18 years ago." (Opp. at 17.) However, that there remains no clear answer, even after almost two decades, to how the law enforcement proviso interplays with § 2680(a)'s general exceptions only further supports the need for resolution by the Court. Uniformity is essential to federal jurisprudence. The Court

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[5] Courts have focused their inquiry on the discretionary function provision because there was no reason to go farther. *See, e.g.*, *Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001) ("Because we conclude that the [federal] agents were carrying out such a discretionary function, we need only address and answer the [discretionary function] inquiry.").

should grant *certiorari* and provide clear guidance to the lower courts on this important and recurring issue.

CONCLUSION

For the reasons set forth herein, and in the Petition, *certiorari* should be granted and the decision below should be reversed.

Respectfully submitted,

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